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How to Read the Constitution: Self-Government and the Jurisprudence of Originalism

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The argument that original meaning should guide constitutional interpretation is nearly as old as the Constitution itself. Before there were strict constructionists, before there were judicial activists, there were originalists. In those early days, few seriously objected to the notion that the Constitution should be read in accord with its original meaning, though there were plenty of debates over how best to ascertain that original meaning and what exactly was required to be faithful to the Constitution of the founding.

The modern originalism debates are different. The authority of the original meaning of the Constitution has been routinely challenged in basic ways. The claim that the Constitution should be understood differently—that it is a "living Constitution" that means something different today than it meant when it was adopted, for example—is now itself quite old. It is now thought that adherence to original meaning is one alternative among many, a choice that might be made or that might not. If originalism is not exactly on the defensive, it at least has to be defended.

For judges who wish to exercise the power of judicial review, adherence to the original meaning of the Constitution is the only choice that is justifiable. We might use the language of the Constitution to help make sense of and to express our highest political ideals and aspirations. We might borrow from the constitutional text to help remind us of our past political struggles or inspire us to take on new national projects. When judges attempt to set aside the policy decisions of our elected representatives, when they claim that their own constitutional judgments trump those of others, then they cannot rest such claims on mere political idealism couched in a loose constitutional rhetoric. Judges are entitled to respect when asserting that a law is null and void *only* when they can back up such assertions with a persuasive explanation of how the law violates the meaning of the Constitution as it was framed and ratified.

By the original meaning of the Constitution, I am referring to the meaning that the constitutional text was understood to have at the time it was drafted and ratified. To adopt originalism does not mean that judges must hold a séance to call the spirit of James Madison to ask him what was on his mind in Philadelphia in the summer of 1787 or how he would deal with the tricky constitutional question that is raised by the case before the court. It does mean that judges should not feel free to pour their own political values and ideals into the Constitution. It means that the constant touchstone of constitutional law should be the purposes and values of those who had the authority to *make* the Constitution—not of those who are charged with governing under it and abiding by it.

One important point should be clarified early. The commitment to originalism is not a commitment to the particular practices, plans, and expectations of particular framers or of the founding generation. We are bound by the constitutional text that they adopted and by the principles embodied in that text. Their

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understandings about the practical implications of those principles and the particular applications that they expected to flow from them may be helpful to us as we try to figure out what exactly those constitutional principles were, but those early applications are rarely equivalent to the constitutional requirements themselves.

The founders and early government officials who were members of or close to the founding generation may well have fully implemented the principles of the Constitution, but in many cases they did not. Some issues may simply not have arisen at an early date, or the circumstances with which they dealt may not have tested the limits or full extent of those constitutional principles. They may have self-consciously limited themselves, adopting policies that did not test or stretch the limits of the powers that they thought the government possessed or the rights to which they thought individuals were entitled. They could also be wrong about what their own principles required.

The members of the founding generation were as aware as anyone of the limits of human reason and of the temptations of political power. They drafted constitutions precisely because they knew that they and their successors would need constant reminders of the principles that they held dear and of the foundational agreements that they had struck. As constitutional interpreters, we are required to reason from the principles that they laid down, not to take their word for the particular applications that should be made of those principles. The task of constitutional interpretation requires wisdom, learning, and discernment, but it also requires humility and discipline. The operative question for a faithful constitutional interpreter is not what *would* Madison do in such a situation, or even what *did* Madison do in such a situation, but what does the principle that Madison and his fellows wrote into the Constitution require in such a situation. Reference to the founders is indispensable to answering such a question, but it remains only a starting point.

This should also caution us against confusing a commitment to originalism with a hostility to the full range of methods that judges normally employ to resolve legal problems. A jurisprudence of originalism is entirely consistent with traditional doctrinal analysis, engagement with constitutional text and structure, and attention to constitutional purposes and values. Originalism does not insist that judges eschew doctrinal analysis or that they refuse to draw inferences from the structure of the Constitution and the government that it creates ("unwritten" though those structural implications might be). Originalism does insist that such interpretive aids be recognized as the tools that they are. Their value lies in their ability to help us in the process of discovering and applying the original meaning of the Constitution. They become inimical to originalism only when the interpreter forgets that they are mere tools, when the manipulation of precedent becomes an end in itself, or when a focus on larger constitutional purposes leads us to ignore the specific ways in which the original Constitution was designed to achieve those purposes.

WHY ORIGINALISM?

There are several interrelated justifications for a jurisprudence of originalism. Originalism is implicit in the design of a written constitution. The adoption of a written constitution is justified by the desire to fix certain principles and raise them over others as having special weight. The writing of a constitution allows the people to assemble and, in a moment of reflection and deliberation, adopt those specified principles. Originalism makes sense of the fact that it was *this* text and no other that was adopted and ratified, and it channels the judicial inquiry into discovering what was meant by those who adopted this text. A jurisprudence of originalism recognizes and emphasizes that the Constitution is a communication, an instruction, from an authorized lawgiver, the sovereign people, and that the task of the faithful interpreter is to discover what that instruction was and to apply it as the situation demands.

At heart, all of these justifications are concerned with explaining the basis on which judges can claim the authority to ignore the policies made by elected legisla-

tors. Government officials in the United States do not exercise force and power by divine right. Their authority for making legitimate laws that average citizens are expected to obey comes ultimately from their constitutional office. Government officials are chosen to make policy within the limited scope of their predefined legal authority. Legislators are elected to make laws that are intended to serve the public good and operate within constitutional limits. The President is elected to secure the national interest and to ensure that those laws are implemented effectively. Judges are not elected for the general purpose of making good policy. Judges are selected to interpret and apply the law in the cases and controversies that arise before them.

The claim to exercise the power of judicial review, the claim to the authority to ignore an otherwise valid law, can only be inferred from the Constitution. The Constitution does not, in so many words, simply give judges the power to veto laws. The power of judicial review in a particular case is merely an inference from the judicial duty to apply the law—all the law—correctly and appropriately to the case at hand.

As Chief Justice John Marshall explained over two centuries ago, if Congress were to instruct the judges that a citizen be convicted of treason on the testimony of only one witness when the Constitution requires two or that a citizen be held criminally liable for actions that were legal when they were committed, then judges would have no choice but to recognize that the superior law of the Constitution would have to govern the case, regardless of the instructions of Congress.[1] A jurisprudence of originalism makes better sense of why John Marshall was correct than does any alternative. Once judges depart from originalism, once they are no longer guided by the original meaning of the Constitution in resolving the cases that come before them, their very claim to the power of judicial review becomes open to question.

It is easy to forget that the writing of constitutions was an American innovation. Colonial charters and frameworks for government that defined and commemorated the powers of political bodies and the rights of individuals were basic features of the political system in British North America prior to the American Revolution. With the Revolution, the former colonies became self-governing, and among the first acts of these newly independent communities was the drafting of new constitutions.

There was never any serious question about whether the American states should have written constitutions. As soon as the states declared their independence, revolutionaries such as John Adams declared that the people of the states "must erect the whole building with their own hands, upon the broadest foundation." The need to self-consciously create new governments in the midst of revolution, to recognize that those governments were to be limited governments only, and to respect the fact that "the people were the source of all authority and original of all power" meant that elected constitutional assemblies would have to be convened and constitutions drafted to represent the will of the people.[2]

FIXED PRINCIPLES

The writing of the American constitutions points to a jurisprudence of originalism in several ways. The first connection lies in the context in which those constitutions were written. Instead of drawing upon its own colonial history, American constitutionalism could have followed the example of England. The colonial charters had specified in writing what powers and liberties the king had given the colonial governments and, in some instances, what liberties and privileges had been asserted and recognized. The British constitution itself, however, consisted of a tradition of governmental practice, general political understandings, and occasional written declarations.

The founding generation was acutely aware of the difference. James Wilson, a leading member of the

[1] *Marbury v. Madison*, 5 U.S. 137, 179 (1803).

[2] John Adams, *The Works of John Adams*, ed. Charles Francis Adams, vol. 3 (Boston: Little and Brown, 1851), p. 16.

Philadelphia Convention and one of the first justices on the Supreme Court, explained in his influential lectures on law that the "order of things in Britain is exactly the reverse of the order of things in the United States. Here, the people are masters of the government; there, the government is master of the people." To illustrate, he quoted from the prominent contemporary British philosopher and legal scholar William Paley:

> The system of English jurisprudence is made up of acts of parliament, of decisions of courts of law, and of immemorial usages; consequently, these are the principles of which the constitution itself consists; the sources, from which all our knowledge of its nature and limitations is to be deduced, and the authorities, to which all appeal ought to be made, and by which every constitutional doubt or question can alone be decided…. An act of parliament, in England, can never be unconstitutional, in the strict and proper acceptation of the term.

The British constitution was founded in no "higher original" than that which "gives force and obligation to the ordinary laws and statutes of the realm."[3] From the perspective of the American founders, "no such thing as a constitution, properly so called, is known in Great Britain." It was a "creature" of the government. It did not recognize "the supreme power of the people."[4]

It was this tradition that relied on "acts of parliament" and "decisions of courts of law" that the founders sought to reject by writing a constitution. The founders cherished what they took to be the substance of British rights and liberties—rights and liberties that they hoped to secure better in the United States. They rejected the structure and form of British constitutionalism. Paley derided those who talked of "bringing back the constitution to its first principles," for "no such first principles, original model, or standard exist" in Britain.[5] Or as one member of Parliament explained the British philosophy of the revolutionary period, "No Government ever was built at once or by the rules of architecture, but like an old house at 20 times up & down & irregular." Constitutional principles fell out from whatever it was that the government did, and there was no "argument or practice so bad that you may have precedents for it."[6] The American constitutions were not to be constitutions of precedent; they were to be constitutions of "first principle."

The political crises that had led to the revolutionary break had convinced the founding generation of the inadequacy of the British constitutional form. The British constitution seemed to include everything and nothing. "Every man quotes it, and upon every occasion too: but few know where to find it."[7] The apparent security of the written colonial charters was subverted by their complete dependence on the unilateral will of the British crown; they were no more than "temporary provisions," always subject to revision by British authorities.[8] The entire constitutional scheme was subject, the colonists complained, "to a *perpetual mutability*," and their liberties were never "properly defin'd."[9] "Misunderstandings" between the colonists and the British were inevitable, Benjamin Franklin explained to a British correspondent, until "a Constitution was formed and settled for America, that we might know what we are and what we have, what our Rights and what our Duties, in the Judgment of this Country as well as in our own."[10]

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[3] James Wilson, *The Works of James Wilson*, ed. James De Witt Andrews, vol. 2 (Chicago: Callaghan, 1896), pp. 384, 385–386.

[4] *Ibid.*, p. 383.

[5] Quoted in *ibid.*, p. 385.

[6] George Saville, quoted in Jack P. Greene, *Peripheries and Center* (Athens: University of Georgia Press, 1986), p. 65.

[7] Quoted in John Philip Reid, *Constitutional History of the American Revolution*, vol. 2 (Madison: University of Wisconsin Press, 1989), p. 4.

[8] Quoted in Edmund S. Morgan and Helen M. Morgan, *The Stamp Act Crisis* (Chapel Hill: University of North Carolina Press, 1953), p. 12.

[9] Quoted in Greene, *Peripheries and Center*, p. 54.

[10] Benjamin Franklin, *The Papers of Benjamin Franklin*, ed.

A written constitution was meant to fix the principles of government. Samuel Adams had demanded to see the imperial constitution "wherein the terms of our limited dependence are precisely stated. If no such thing can be found…the sound we are squabbling about has certainly no determinate meaning." Such "constitutions" are "the very instruments of slavery." They were standing invitations to "usurping innovators." [11] Instead of the interminable equivocation characteristic of British governors, it was hoped that a written constitution would force all sides to admit to, confirm, and guarantee a known set of principles. Constitutional terms and guarantees would demand universal recognition, replacing the need for arguments employing complex analogies and referring to an undefined set of multiplying and changing principles. The constitutional text was to provide clear evidence of promises exchanged and accepted.

Even the founding generation recognized that the precision of a written constitution would be far from perfect. The point was to constrain future constitutional debate within a limited framework. In one of the very first cases in which the U.S. Supreme Court was called upon to consider the constitutionality of a legislative act, Justice William Paterson began by distinguishing the American from the British constitutional systems:

> It is difficult to say, what the constitution of England is: because, not being reduced to written certainty and precision, it lies entirely at the mercy of parliament: it bends to every government exigency; it varies and is blown about by every breeze of legislative humor or political caprice…. [I]n England, there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different: Every State in the Union has its constitution reduced to written exactitude and precision.
>
> What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental law are established. The Constitution is fixed and certain; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it.[12]

In contrast to the common law or the British constitutional system, the written nature of the Constitution should not be subject to change over time except through explicit and deliberate amendment. Justice Joseph Story warned:

> Temporary delusions, prejudices, excitements, and objects have irresistible influence in mere questions of policy. And the policy of one age may ill suit the wishes or the policy of another. The constitution is not subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and for ever.[13]

Fixing constitutional principles in a written text against the transient shifts in the public mood or social condition becomes tantamount to an originalist jurisprudence. As storms of popular passion sweep across the political landscape, it is to be expected that rapid and extreme shifts in public attitudes will guide political action. Such shifts may lead government officials some distance from the founding principles that would otherwise be revered and followed. In order to

William Willcox, vol. 21 (New Haven: Yale University Press, 1981), pp. 110–111.

[11] Samuel Adams, *The Writings of Samuel Adams*, ed. Harry Cushing, vol. 3 (New York: G.P. Putnam's Sons, 1906), p. 262.

[12] *VanHorne's Lessee v. Dorrance*, 2 U.S. 304, 308 (1795).

[13] Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hillard, Gray, and Co., 1833), § 193.

prevent government actions, which may have significant and lasting consequences, from being taken in pursuit of momentary interests, a written constitution, properly construed, serves as a reminder and a barrier, constraining politics within a relatively narrow range of deliberately chosen rights, powers, and institutions. The demanding and solemn process of amending the written Constitution—its requirement that government officials seeking to alter constitutional understandings win supermajority support not only from national legislators, but also from the states— seeks to temper and moderate our politics.

The American colonists had experience with constitutional interpretation that was grounded on the presumption of constitutional change. The American constitutional tradition was a self-conscious rejection of that practice. The unwritten constitution, exemplified by the British, necessarily called forth an interpretive strategy combining moral reasoning, historical analogy, the accumulation of precedent, and appeals to contemporary practice and judgment, intertwining momentary "policy" with constitutional principle. The written constitution calls on the faithful interpreter to identify the principle fixed in that text at a specific moment of constitutional founding. A jurisprudence of originalism is congruent with and makes sense of this basic feature of American constitutionalism.

THE CONSTITUTION AS LAW

The British constitution, though unwritten, was to serve as the fundamental law of Britain but did so largely in a political rather than a judicial sense. In order to realize the fundamental law as a judicially enforceable instrument to restrain the legislature, the unwritten principles behind government had to be fixed in writing. As a fixed and written text, the supreme law of the Constitution can be self-consciously considered and properly ratified and can have the specificity to provide judicial instruction.

A judge who strikes down a law as unconstitutional does so not on his own personal authority, but on the authority of the Constitution. He speaks authoritatively not for himself, but for the law—not as a constitutional actor, but as a constitutional interpreter. The text of the Constitution, in turn, has authority only as a consequence of its popular provenance. If not for its origins in popular assemblies democratically authorized to draft and ratify the Constitution, the text would have no authority at all, and judges would have no basis on which to set aside the policy judgments of legislators elected to make just such judgments.

It was commonplace for the judges at the beginning of the American republic to explain why they possessed a power of judicial review when the British judges to which they were otherwise related did not. Central to that explanation was the characterization of the Constitution as a law that was given meaning by the supreme lawmaker, a specially elected constitutional assembly. Judges rarely bother to justify judicial review anymore; now it can be assumed. The power can be assumed, however, only because the original justification offered by Chief Justice Marshall and others was persuasive and only to the extent that it is used in a fashion that is consistent with that justification.

A jurisprudence of originalism provides that connection. The drafting of a fixed text can provide judicial instruction and therefore can be judicially enforceable against legislative encroachment. This judicial requirement of a fixed text not only authorizes judicial review, but also limits it within the context of determinate meaning.

- Future Supreme Court Justice James Iredell explained in a letter to Richard Spaight, then serving as one of North Carolina's delegates to the federal constitutional convention, that "without an express Constitution the powers of the Legislature would undoubtedly have been absolute (as the Parliament in Great Britain is held to be)." But in America, constitutions were "a law *in writing*," and as a consequence, judges "must take notice of it." In America, the Constitution is not "a mere imaginary thing, about which ten thousand different opinions may be formed, but

a written document…to which, therefore, the judges cannot willfully blind themselves."[14]

- In Virginia's equivalent to *Marbury v. Madison*, Judge St. George Tucker pointed out that in Britain, "the judiciary, having no written constitution to refer to, were obliged to receive whatever exposition of it the legislature may think proper to make." By contrast, a written constitution was not an "ideal thing, but a real existence." In order to activate the courts, constitutional principles must be "produced in visible form" so that they "can be ascertained from the living letter, not from obscure reasoning or deduction only."[15]
- Alexander Hamilton in *The Federalist Papers* relied on similar reasoning in contending that where meaning is uncertain and subject to continued dispute, the judiciary cannot reasonably act, for a court's only claim to authority is the force of its reason and the clear accuracy of its decision. If the court were "to have neither FORCE NOR WILL but merely judgment," the judges must appear to have no will of their own but must merely make explicit what is already known.[16] Without the fixed standard of the text, constitutional law would appear as the assertion of "will" and would therefore have to be left as a matter for legislatures and elections.

Chief Justice John Marshall emphasized that it was the fixed constitutional text that created the possibility of judicial review. In sharp contrast to the British case, in which a statute stands clear against a fuzzy constitutional background, in America all can easily lay their eyes on the written Constitution, and thus it requires willful blindness either to circumvent its terms or avoid its obligations. Judges could not "close their eyes on the constitution, and see only the law" once the constitution was put in front of them in this way.[17]

If the fact that the Constitution is fixed in a written text means that judges can and must take it into account when resolving cases, there is still the question of why the Constitution is fundamental law against which a "statute can be tested" and found wanting.[18] The answer should be as obvious to us as it was to the founding generation and the early judges. The Constitution is supreme law because it was ratified by the sovereign people in convention, and it alone authorizes and limits governmental action. As the Constitution is legislated by the most authoritative body within the political system, all other legislation is inferior to that law and void if contradictory to it.

The writing of the Constitution allowed the framers to gather the people into convention and to place a document before them that could be examined, debated, and understood. With a written text, the representatives of the people could be gathered to deliberate and to express their will in a durable form that could be promulgated and called to the attention of government officials and judges. Judges are not left to wonder at how authoritative a particular constitutional argument might be or what the Constitution might require. All legitimate constitutional arguments derive from a single source: the embodied will of the sovereign people.

The essential character of the Constitution is that it is drafted and ratified by those authorized to speak for "we the people." Nothing could be more "ridiculous," Iredell concluded, than "for the representatives of a people solemnly assembled to form a Constitution, to set down a number of political dogmas, which might or might not be regarded." That Constitution must stand and "remain in force until by a similar appointment of deputies specially appointed for the same important purpose; and alterations should be with equal solemnity and deliberation made."[19] John Marshall agreed, for this was "the basis, on which the whole American

[14] James Iredell, *Life and Correspondence of James Iredell*, ed. Griffith J. McRee, vol. 2 (New York: D. Appleton and Company, 1858), pp. 172, 173, 174.

[15] *Kamper v. Hawkins*, 1 Va. Cases 38, 78 (1793).

[16] Alexander Hamilton, *Federalist* No. 78, in *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1961), p. 465.

[17] *Marbury v. Madison*, at 177.

[18] *VanHorne's Lessee v. Dorrance*, at 308.

[19] Iredell, *Life and Correspondence*, vol. 2, p. 174.

fabric has been erected." The very idea of a written constitution and the process by which it was created would be "absurd" if it were not "unchangeable by ordinary means."[20] The Constitution is "certain and fixed," and it can, as Patterson observed, be "revoked or altered only by the authority that made it."[21]

But if the Constitution is the fundamental law because it is "the deliberate voice of the people," and if it is "unalterable, but by the same high power which established it," then a jurisprudence of originalism is required.[22] The Supreme Court has recently drawn the obvious conclusion:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts…alterable when the legislature shall please to alter it."[23]

The Constitution is fixed and performs its function of limiting the government within the scope of its legitimate power only if the *meaning* of the Constitution, as well as its language, is "unchangeable by ordinary means." Of course, there can be reasonable disagreement as to what the Constitution's meaning might be relative to a particular issue, and judges must be careful not to assume that a good-faith legislative effort to interpret the Constitution is in fact an "alteration" of the Constitution just because the judges would read the text differently. It is the problem for another essay as to how much deference the courts should give to the legislature when the two branches have competing interpretations of the Constitution. Whatever standard of review the Court employs, however, the substantive evaluation of proffered interpretations of the Constitution should turn on how well they capture the original meaning of the Constitution.

AN INSTRUCTION FROM THE PEOPLE

What is the constitutional text? It is an act of communication, of instruction, from the supreme lawmaker within the American constitutional system to government officials. It conveys their intentions as to what power government officials would have, how that power would be organized, to what legitimate purposes that power could be used, and what limitations there would be on that power.

Since the government is the mere "creature" of the Constitution, its members—legislators and judges alike—are not entitled to change a word of that fundamental law except through the designated procedures of amendment laid out in Article V. It is not for them to assume the power of creator, of constitutional lawmaker, by disregarding or altering the instructions laid down by the framers and ratifiers of the constitutional text. As Alexander Hamilton pointed out in describing the duties of legislators and judges under the Constitution, it is binding on them until "the people have, by some solemn and authoritative act, annulled or changed the established form…and no presumption, or even knowledge of their sentiments can warrant their representatives in a departure from it prior to such an act."[24]

To disregard or alter the meaning of the words in the Constitution is tantamount to disregarding or altering the words themselves. In our everyday lives, we routinely give and follow instructions—parents to children, employers to employees, teachers to students. We make allowances when the instructions are not followed because those giving the instructions did not make their meaning clear or because those following the instructions genuinely did not understand what was asked of them. We routinely forgive mere error when the mistake is made in good faith and is difficult to avoid. The point of such instruction, however,

[20] *Marbury v. Madison*, at 177.

[21] *VanHorne's Lessee v. Dorrance*, at 308.

[22] Iredell, *Life and Correspondence*, vol. 2, pp. 146, 145.

[23] *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997), quoting from *Marbury v. Madison*, at 177.

[24] Hamilton, *Federalist* No. 78, p. 468.

is to convey the instructor's meaning to the instructed. The child would be playing the sophist if he attempted to parse the instruction to authorize something that the parent was well understood to have meant to exclude ("You said no *parties*, but this is just a gathering of friends and friends of friends.").

The point of issuing an instruction is to convey the meaning of those who are authorized to issue them to those who are obliged to obey them. As Madison noted, the faithful interpreter must recur to "the sense in which the Constitution was accepted and ratified. In that sense alone it is the legitimate Constitution."[25] It is only by recurring to the original meaning intended by those who created the Constitution that we can make sense of and maintain the notion that we seek to establish, in the words of the *Federalist*, "good government from reflection and choice."[26] It is only by "carry[ing] ourselves back to the time when the constitution was adopted, recollect[ing] the spirit manifested in the debates," and seeking the most "probable [meaning] in which it was passed," rather than by seeing what meaning "may be squeezed out of the text, or invented against it," that we can avoid rendering the Constitution a "blank paper by construction."[27]

For some, this may seem to be begging the question: Must even a faithful constitutional interpreter be committed to the language and intent of the founders? The short answer is yes. The implicit link between "language" and "intent" indicates the direction of the interpretive imperative. We readily recognize that we cannot be said to be interpreting the text if we disregard its language. But the language of the text does not emerge from the sea or drop from the sky; it was intentionally written by the authors of the text in order to communicate a message, to convey their thoughts to others. At a minimum, the choice of constitutional language reflects the intentions of the framers that a faithful interpreter is bound to respect.

But language is a means, not an end in itself. We use language to convey meaning. We interpret language in order to understand that meaning. If we are free to ignore the meaning that the founders sought to convey in the text, then why are we not equally free to ignore the text itself? Why be bound by the words that they happened to write down if we are not bound by what they meant to say with those words? Why should the language of the Constitution, disassociated from any intended meaning, have any particular authority? If the authority of the Constitution lies in the fact that founders were specially authorized to give instruction, to create supreme law, then the meaning of the law that they laid down must be as authoritative as the particular words they used to convey that meaning.

ORIGINALISM AND JUDICIAL ACTIVISM

There are other arguments that are sometimes thought to underwrite a jurisprudence of originalism. They are at most of secondary importance, however, and are occasionally misleading as to what originalism means and why it forms the basis of judicial review. Because they are often heard and are frequent targets for critics of originalism, it should be briefly clarified why proponents of originalism should not rely on them.

It should be emphasized that the point of originalist constitutional interpretation is not to clear the way for current legislative majorities. Originalist arguments have frequently been marshaled to criticize what the Supreme Court has done, to show how the Court is guilty of "judicial activism" and of striking down laws without constitutional warrant. In that context, it makes sense to say that the Court was mistaken because it departed from original meaning and that a properly originalist Court would not have taken the same action, that an originalist Court would have upheld rather than struck down a particular statute, that an originalist Court would have left a particular policy choice up to the legislature.

[25] James Madison, *The Writings of James Madison*, ed. Gaillard Hunt, vol. 9 (New York: G.P. Putnam's Sons, 1910), p. 191.

[26] Hamilton, *Federalist* No. 1, p. 33.

[27] Thomas Jefferson, *The Writings of Thomas Jefferson*, ed. H. A. Washington, vol. 7 (New York: Derby & Jackson, 1859), p. 296; Thomas Jefferson, *The Writings of Thomas Jefferson*, ed. Paul Leicester Ford, vol. 8 (New York: G.P. Putnam's Sons, 1899), p. 247.

But we should not generalize from those particular cases. Originalist judges are not necessarily deferential judges. It may well be the case that the originalist Constitution has little of substance to say about some particular current political controversy. The Constitution may not require anything in particular in regard to euthanasia, abortion, homosexuality, or affirmative action. Deferring to the Constitution in such cases may simply mean holding them open for future political resolution, and the constitutional interpreter should be sensitive to that possibility. The judge should have the humility to recognize that the Constitution may not provide clear answers to all the questions asked of it, that elected officials have the right to make important policy choices without judicial intervention, and that the Constitution may not simply write the judge's own preferred policies into the fundamental law.

Nonetheless, it may also be the case that faithful constitutional interpretation requires turning aside the preferences of current legislative majorities. The Constitution enshrines popular, not legislative, sovereignty. It creates a republic with a limited government, not simply a majoritarian democracy. The goal of a jurisprudence of originalism is to get the Constitution right, to preserve the Constitution inviolable. It denies that judges are freewheeling arbiters of social justice, but it also denies that they are mere window dressing. As Chief Justice William Rehnquist once wrote, "The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not."[28] The jurisprudence of originalism seeks to hold true that balance, whether that requires upholding the application of a statute in a particular case or striking it down. The issue for originalism is which laws should be struck down, not how many (something which, after all, also depends greatly on the behavior of legislators). Proponents of originalism merely open themselves up to charges of hypocrisy when they approve of instances of judicial review if they do not make plain that it is not deference to politicians that they seek but fidelity to the Constitution.

It is also sometimes contended that the value of originalism lies in its ability to limit the discretion of judges. Originalism, it has been argued, will prevent judges from legislating from the bench or imposing their own value judgments on society. There is something to this argument, but it can be overstated. To be sure, there was a time in which judges and scholars often thought that the very purpose of courts and the power of judicial review was simply to pursue social justice. Thankfully, such hubris is less common today. But here again, judicial discretion as such is not the issue. The issue is the role of the courts and how the power of judicial review is to be used. Individual judges may well feel little discretion about what they should do in a given case, even if their jurisprudential philosophy is one based on, say, theories of liberal egalitarianism or utilitarian pragmatism. Such judges are in error not because they feel free to do what they personally want in constitutional cases but because they misperceive the basis of their own power and the requirements of constitutional fidelity.

At the same time, proponents of originalism should not delude themselves or others as to the difficulty of the task of identifying and applying the original meaning of the Constitution. It is in no way "mechanical." Disagreement among individuals seeking in good faith to follow a jurisprudence of originalism is entirely possible. The judgment, intelligence, skill, and temperament of the individuals called upon to interpret the Constitution still matter. Judges must still resist the temptation to line up the constitutional founders to agree with their own personal views, just as they must resist the temptation to line up the precedents or the moral philosophies or the policy considerations. A jurisprudence of originalism will at least ensure that judges are focused on the right discussion—what the Constitution of the founders requires relative to a given case—even though it cannot ensure that everyone will reach the same or the correct conclusion once engaged in that discussion.

[28] *Webster v. Reproductive Health Services*, 492 U.S. 490, 521 (1989).

It is one thing, however, for judges to be open to the criticism that they cut corners in their effort to discover the original meaning of the Constitution. It is quite another for them to be open to the criticism that they are imposing the wrong moral value judgments on the political process. A jurisprudence of originalism insists that judges should strive never to be guilty of the latter criticism while endeavoring to avoid being guilty of the former.

It is sometimes thought that the fate of originalism turns on whether the constitutional framers would have wanted later interpreters to be guided by originalism—that is, on what the "interpretive intentions" of the framers were. This is misguided. Nothing turns on that question. Critics are quite right that one cannot bootstrap a jurisprudence of originalism by reference to the interpretive intentions of the founders. It is circular and unhelpful to argue that judges must adhere to original meaning because that was the original intent. A theory of originalism must stand on its own foundation.

Originalism is justified because it makes the most sense of our constitutional forms and practices and of the basic theory of American constitutionalism. Originalism is justified because anything else makes nonsense of the idea of a written constitution deliberately drafted and ratified by the sovereign people and because anything else leaves the power of judicial review without legitimacy. We should take heed of what James Madison and John Marshall, James Iredell and James Wilson said about written constitutions and judicial review not because they have special authority to tell us how the Constitution should be interpreted but because they thoughtfully grappled with making sense of the bold constitutional experiment that the former colonies were making and, in this case, their words hold wisdom for those of us seeking to continue and preserve their experiment in constitutional self-government.

CONSTITUTIONAL SELF-GOVERNMENT

There are three ways to resolve current political disagreements. We can somehow work them out ourselves through majority rule, bargaining and compromise, deliberation and debate, and the like. That is, we can make our decisions through normal politics. Alternatively, we can delegate the decision to somebody else. To some degree, we almost always delegate anyway by electing and hiring representatives to hash out the nation's business in the capital while we get on with the more important business of living our lives.

But "we" could choose to delegate our controversial political decisions to an even greater degree, throwing the issue into the lap of a "blue-ribbon commission," some executive administrator, or even the courts, perhaps with little or no guidance as to how that issue ought to be resolved by this favored agent. We can simply divest political discretion to some third party and live with the results. We do sometimes use courts in this way. The Sherman Antitrust Act famously handed the problem of identifying monopolies and monopolistic behavior over to the courts, instructing them to do *something* but not leaving many clues as to what they were to do.

It is possible to use courts in that way, but we should be reluctant to conclude that constitutional judicial review was such a delegation of unfettered policy discretion. Statutory delegations such as those contained in the original Sherman Act are subject to legislative oversight and revision; judges exercise discretion, but only for now and only with implicit or explicit accountability to elected representatives. It is possible that the Constitution contains similar delegations to judges. The founders might have said the equivalent of "protect 'liberty,' whatever that is." Given the general design of the Constitution and the political assumptions on which it was based, it would be surprising if they did so, or at least did so very often or in especially important ways.

Those who would claim such an authority on the part of judges bear a very high burden not only to show that the founders did not give more substantive content to their constitutional language, but also to show that when they left constitutional discretion to later generations, they entrusted that discretion to unelected and largely unaccountable judges rather than to the people and their representatives. Those who

would give a freewheeling discretion to judges to develop and enforce "preferred freedoms," "fundamental values," or "active liberty," unconstrained by the value choices that were already made at the time of constitutional drafting, bear a heavy burden to show why it is that judges rather than legislators or citizens should have the ultimate authority to identify "our" favored values and most cherished liberties or what is to be done to best realize our national aspirations.

The other way to resolve our current disagreements is to abide by decisions that have already been made; that is, we can adhere to the existing law. Rather than revisit controversies ourselves or trust the discretion of someone else, we can simply defer to earlier judgments embodied in the law. Having made the decision to keep faith with the law, we may appoint someone to interpret and apply the law for us and keep things on an even keel until we are ready to revisit the issue—perhaps recognizing that we ourselves may be too tempted to deviate from the law in particular instances or may be too prone to make unintended or unthoughtful mistakes in applying the law. We should recognize that the interpretive effort will require the exercise of some judgment, but we would, of course, expect the appointed interpreter not to exercise the discretion of a delegated decision-maker.

The issue is what standard should be used to resolve contemporary political controversies and who should have the authority to make the resolution. Contemporary political actors are displaced by any judicial decision. If judges offer an interpretation of the text in accord with the language and intent of the founders, then those contemporary political actors have only deferred their right to make the choice themselves and remake the law. If judges make constitutional law without offering an interpretation of the original Constitution, then we have simply replaced one relatively democratic set of contemporary policymakers with another much less democratic one. If judges interpret the originalist text, then the people retain their sovereign lawmaking authority to create, amend, or replace the higher law. If judges do not, then the legislative power of the sovereign people would have been lost. The basic constitutional choices would be made by judges rather than by those who draft and ratify the constitutional text, whether those drafters and ratifiers did their work two hundred years ago or yesterday.

As James Iredell observed even as the federal Constitution was being drafted, there would be no point to assembling and writing a constitution if those charged with interpreting and adhering to it could ignore what was decided in those assemblies and instead choose to follow a different rule. The supreme power would no longer lie with those who write the Constitution, but instead would lie with those who write the constitutional law.

We privilege the intentions of the founders out of respect for the role of the constitutional founder, not out of respect for any particular founder. It is commonplace that we distinguish between the office and the officeholder, between institutional and personal authority. We respect the actions of the President and the Congress out of regard for the offices, not out of regard for the individuals who hold those offices. Likewise, those who drafted and ratified our present Constitution occupied a political role. It is a role that we do and should respect, not least because it is a role that we could ourselves play.

There is no question that the founding generation was uniquely situated at the historical birth of the new nation and uncommonly blessed with political talent and wisdom, but too much myth-making can also be subversive of consensual constitutional governance and should certainly form no part of our current justification for adhering to the inherited Constitution. We should respect the substance of the constitutional choices of the founding not because the founders were especially smart, because they necessarily got it right, or because we happen to agree with them on the merits. Although the founders did create a remarkably flexible and successful constitutional system, there are any number of individuals in our own society who are smart, think they can get it right, or whose values others would likely endorse.

If being smart or "right" was the sole lodestar for our judgments about constitutional meaning, there would be plenty of aspirants who could claim that we should follow them rather than the founders. We should respect the substance of choices of the founders because only they spoke on the basis of the "solemn and authoritative act" of the people. We should respect their choices because we should take seriously the idea of constitutional deliberation and choice through democratic means, of constitutional foundings as conscious, real-time political events. We should act so as to preserve the possibility of constitutional self-governance.

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